THE CITY OF LONDON LAW SOCIETY

COMPANY LAW COMMITTEE

Response to FCA consultation on "Greater transparency of our enforcement investigations" (CP24/2, Part 2)

This response has been prepared by the Company Law Committee of the City of London Law Society (the "**CLLS**"). The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 22 specialist committees. The CLLS Company Law Committee ("**CLLS CLC**") is made up of senior and specialist corporate lawyers.

The CLLS Regulatory Law Committee has shared with the CLLS CLC a copy of its response to the FCA's consultation on "Greater transparency of our enforcement investigations" (CP24/2, Part 2). The CLLS CLC supports the comments made by the CLLS Regulatory Law Committee in its response.

In addition, we remain concerned that the FCA's proposals: (i) are out of step with comparable jurisdictions; (ii) will not enhance the competitiveness or attractiveness of the UK as a listing venue and appear non-aligned with the FCA's secondary competitiveness and growth objective; and (iii) could make it difficult for listed issuers to comply with their obligations to disclose inside information in a timely manner and to ensure that announcements are accurate and not misleading by omission or otherwise. We would draw the FCA's attention to these points, which were made more fully in the response of the CLLS CLC to the initial consultation, and which are set out in the Annex to this response for convenience.

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ANNEX

Discrepancy in policy approach

The proposals do not enhance the competitiveness or attractiveness of the UK as a listing venue and may in fact discourage companies from considering listing in London, in circumstances where enforcement authorities in other major financial centres whether in the US, Europe or Asia take a different approach to public disclosure in relation to investigations. This means the proposals are, in our view, arguably inconsistent with the policy approach underpinning the FCA's proposed listing reforms.

Impact of investigations into a suspected breach by a listed company of the Listing Rules, DTRs, Prospectus Regulation Rules or Articles 17 to 19 of UK MAR

The fact that the FCA is investigating such a breach might well be price-sensitive. First, it should be permissible for the listed issuer to determine that the fact of the commencement of an investigation does not meet the test for requiring disclosure under the UK's market abuse regime – whether because it concludes that there is not yet a realistic prospect of enforcement action ultimately being taken or because it concludes that it should be permitted to delay disclosure where ongoing discussions with the regulator would be prejudiced by premature disclosure. If, however, the FCA pre-emptively publishes information about an investigation at the outset of that investigation, the issuer is likely to be limited in what it can say and, by virtue of saying little or nothing, risks confidence being undermined in the issuer and its share price being adversely affected – potentially to the detriment of its shareholders and other stakeholders. In addition, if the issuer does publish a response to any early stage announcement by the FCA, it will need to ensure that such response is not misleading, by omission or otherwise: depending on the circumstances, it may be difficult for the issuer to meet this threshold without disclosing more details about the circumstances that have led to the investigation, next steps and possible outcomes than would be otherwise necessary - potentially to its commercial detriment and to the detriment of its shareholders and other stakeholders.

An announcement by the FCA that it is investigating an alleged breach has the potential to damage investor confidence in the company and, where the issuer is a regulated entity, it could also undermine confidence in the regulated entity. This will particularly be the case if the nature of the alleged breach indicates that the FCA has concerns with regard to the company's systems and controls or its compliance with applicable law and regulation. Any such disclosure could also result in media speculation as to the nature and extent of any potential issues. For example, any suggestion that a listed issuer may have issues with its systems and controls such that it is unable to assess its financial position and prospects accurately could lead to a disorderly market in the company's shares - particularly if, for example, the investigation relates to a previous announcement by the company that the FCA alleges was incorrect or misleading. Such announcements may also be damaging to the reputation and standing of individual directors or members of management who the media may see as being implicated in any such potential breach even where the FCA has not sought to take any action against the individuals in question. Those individuals will inevitably be constrained in what they can say in response to any such media stories especially where an investigation in relation to the company is only at a very early stage.